IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1948~~. 1949

R. M. POWELL et al.,
Petitioners,
vs.
THE UNITED STATES CARTRIDGE COMPANY, a Corporation,
Respondent.

No. ~~836~~ 11

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

and

BRIEF IN SUPPORT THEREOF.

THOMAS BOND,
Attorney for Petitioners.

June 2, 1949.

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Cases Cited.

Statutes Cited.

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R. M. Powell and fifty-eight other plaintiffs, who are the petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause pursuant to opinion and concurring opinion filed on April 12, 1949, reversing the judgment of the District Court of the United States for the Eastern District of Missouri. The said judgment became final on May 7, 1949, when the said Court without opinion denied petitioners' petition for a rehearing, modified its opinion, vacated its judgment of April 12, 1949 and entered a new judgment of reversal without costs (R. 1038).

OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit in this case and the concurring opinion are unreported as yet. They will be found at pages 982 and 997 of the Record herein.

JURISDICTION.

The jurisdiction of this Court is based upon Title 28 USCA, Section 1254, being a revision of Section 240 (a) of the Judicial Code as amended (Title 28 USCA 347); also cases cited under "Reasons for Granting the Writ."

QUESTIONS PRESENTED.

The questions presented are:

1. Are the Fair Labor Standards Act and the Walsh-Healey Act mutually exclusive?

2. Are the Fair Labor Standards Act and the Walsh-Healey Act so divergent that both may not apply at the same time on the same project?

3. Did the National Defense Acts of June 28, 1940 and of July 2, 1940, or any executive action taken thereunder suspend or exclude the operation of the Fair Labor Standards Act in the St. Louis Ordnance Plant?

4. Did the Act of July 2, 1940 set up a complete scheme of labor relations at the St. Louis Ordnance Plant exclusive of the Fair Labor Standards Act?

5. Were the munitions manufactured at the St. Louis Ordnance Plant for interstate shipment "goods," and were they "produced for commerce," within the meaning of the Fair Labor Standards Act?

6. Whether petitioners while working in the Safety Department of the St. Louis Ordnance Plant were within the coverage of the Walsh-Healey Public Contracts Act, and, if so, were they for that reason excluded from the Fair Labor Standards Act?

7. Were petitioners while so employed within the coverage of the Fair Labor Standards Act?

STATUTES INVOLVED.

The United States Statutes involved are:

The Fair Labor Standards Act, 29 USCA, Sections 201 to 219.

The Walsh-Healey Act, 41 USCA, Sections 35 to 45.

The First National Defense Act enacted June 28, 1940; 50 USCA, Appendix 1151, et seq.

The Second National Defense Act enacted July 2, 1940; 50 USCA, Appendix, Section 1171, et seq; also 5 USCA, Section 189 (a).

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was brought by petitioners to recover overtime compensation under the Fair Labor Standards Act while employed in the Safety Department of the St. Louis Ordnance Plant operated by the respondent, The United States Cartridge Company, under a cost-plus-a-fixed-fee contract which specified that the respondent was to "operate the plant" (R. p. 764), and described respondent's status as that of an "independent contractor", and it was expressly stipulated in the contract that the contractor was "in no wise an agent of the Government" (R. p. 780), and further that the contractor should "make all * * * contracts in its own name and not bind or purport to bind the Government or the contracting officer thereunder"

(R. p. 787). The pleadings admit and the opinion below concedes that petitioners were all employees of respondent (R. pp. 30, 983).

This case is of the same general character as Kennedy v. Silas Mason Co., 334 U. S. 249 (1948), 92 L. Ed 1347. There are here raised the principal questions which this Court found important in the Kennedy case but did not decide because the record did not afford a satisfactory basis for their determination (l. c. 257). Here, however, the case was tried on its merits in the District Court, the facts were fully developed, and the trial resulted in judgments for the plaintiffs (petitioners here) for the amount of overtime due plus liquidated damages and an attorney's fee. (See Findings of Fact, Conclusions of Law and Judgment of U. S. D. C., R. 916-922.) The record here presented is thus factually complete. It contains the matter this Court found to be lacking in the Silas Mason Co. case, and we submit affords a satisfactory basis for the determination of the questions involved.

In both courts below respondent urged in defense that the products produced at the St. Louis Ordnance Plant were not commerce nor were they goods within the meaning of the Fair Labor Standards Act, supporting these defenses by the arguments used by the Fifth Circuit in Kennedy v. Silas Mason Co., 164 Fed. (2) 1016, and other cases taking that view. Petitioners, on the other hand, contended contra that they were engaged in the production of goods for commence and that the munitions produced were such goods within the meaning of the Fair Labor Standards Act, and relied upon.

Bell v. Porter, 159 Fed. (2) 117 (7th Cir.);
Umthun v. Day & Zimmerman, Inc., 235 Ia. 293, 16 N. W. (2) 259;

Jackson v. Northwestern Airlines, 75 Fed. Supp. 32;
Timberlake v. Day & Zimmerman, Inc., 49 Fed. Supp. 28;
Moehl v. Du Pont de Nemours & Co., 6 W. H. Cases 638, 12 Labor Cases No. 63545;
Clyde v. Broderick, 144 Fed. (2) 348,

and numerous other cases upholding the view that employees of the cost-plus-a-fixed-fee war contractor employed at the Government owned plants in the making of munitions were covered by and entitled to the benefits of the Fair Labor Standards Act.

When the opinion of this Court in Kennedy v. Silas Mason Co., supra, appeared the Court below transferred this case to banc, set aside a previous submission, and ordered reargument with particular reference to the statutes declared by this Court in the Kennedy case to be involved in the determination of these issues, to-wit, the Act of July 2, 1940, the Walsh-Healey Act, and the Fair Labor Standards Act. The Court below determined this case on a novel construction of the above mentioned Federal statutes, and in reversing the judgments of the District Court, the Court below ruled that the Walsh-Healey Act and the Fair Labor Standards Act are mutually exclusive; that they are so divergent that they cannot apply at the same time; that plaintiffs and all employees of respondent were covered by the Walsh-Healey Act, and were thereby excluded from the coverage of the Fair Labor Standards Act. The concurring opinion goes further and holds that the Act of July 2, 1940 provides its own scheme of labor relations and suspends operation of all other labor relation laws in the war plants, and both opinions reached the conclusion that the United States District Court was without jurisdiction to grant relief to petitioners under the Fair Labor Standards Act. Believing each and all of

the foregoing rulings of the Court below to be untenable, and they being questions of great public importance, we have brought these proceedings to obtain a review.

REASONS FOR GRANTING WRIT.

1.

The reasons why certiorari should be granted in this case cannot be better stated than by this Court in its opinion in Kennedy et al. v. Silas Mason Co., 334 U. S. 249, 92 L. Ed. 1347, decided May 17, 1948. The Kennedy case was brought under Section 16 (b) of the Fair Labor Standards Act by a group of inspectors and foremen employed at the Shreveport, Louisiana ordnance plant to recover overtime compensation as prescribed in Section 7 of the Act, plus liquidated damages and an attorney's fee. This case was brought under the same Act to obtain the same relief by fifty-nine men employed mostly as inspectors in the St. Louis Ordnance Plant. Both plants were Government owned and operated under cost-plus-a-fixed fee contracts. There were some differences in that in this case the contract described the status of the contractor as an "independent contractor," and it expressly stipulated that the contractor was "in no wise an agent of the Government" (R. p. 780), and further, that it should make all contracts in its own name and not bind or purport to bind the Government (R. p. 787), and in this case the pleadings admit petitioners to be employees of the contractor (R. p. 30). There is a further difference in that the record here shows that a by-product was produced which moved in interstate commerce in substantial quantities as private shipments by the contractor to its own subsidiary on commercial bills-of-lading (R. pp. 356-359). Otherwise, however, this record raises the same fssues as were raised in the Silas Mason Co. case, supra, and the same questfons are involved.

It appears from the first paragraph of this Court's opinion in the Silas Mason Co. case that it involved application of the Fair Labor Standards Act to workers in Government owned plants in which the munitions were produced under a cost-plus-a-fixed fee contract with the War Department. Subsidiary issues were:

1. Whether the workers were employees of the Government or the private contractor.

2. Whether munitions produced for shipment across state lines in war use are produced for commerce.

3. Whether such shipments are goods within the meaning of the Fair Labor Standards Act (l. c. 251).

This Court held that in the determination of these issues "three Acts of Congress require consideration," to-wit, the Fair Labor Standards Act, the Act of July 2, 1940, and the Walsh-Healey Public Contracts Act. This Court held that substantial claims were involved "and many other cases than this will be controlled by its decision" (l. c. 251-2), and throughout the opinion the Court referred to the issues as "far reaching," "far flung," and "important." The Silas Mason Co. case came to the Court on motion for summary judgment supported by a very scant record which contained no testimony. At the outset this Court raised the question whether it should, as a matter of good judicial administration, "attempt to decide these far flung issues on this record" (l. c. 252), and the Court concluded on the record then before it that it would not be good judicial administration to attempt decision of issues of such "far flung import," and that decision on such issues would be withheld "until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts" (l. c. 257). The record presented by petitioners herewith is such a record. It is based on litigation and

affords that solid basis for decision found wanting in the Silas Mason Co. case. The Court below in its order for reargument found that this record "would seem to be sufficient to warrant the consideration of the question as to the applicability" of the three Acts of Congress above enumerated (R. p. 981). In this case many witnesses were introduced by both sides who described fully the petitioners' duties at the plant, the manner in which the plant operated under the cost-plus-a-fixed fee contract, and the contemporary interpretation placed by the parties themselves upon the prime contract, and upon the application of the Fair Labor Standards Act to the workers in this plant.

We submit that all of the reasons which impelled this Court to grant certiorari in Kennedy v. Silas Mason Co. supra apply with equal force here, and that we have presented with this petition a record which affords a satisfactory basis for the determination of the questions presented, and which this Court indicated it would determine.

2.

Further evidence of the public importance of the questions presented is found in the brief for the Administrator of the Wage and Hour and Public Contracts Division of the United States Department of Labor filed amicus curiae in the Court below in support of the petition for rehearing (R. 1023-1036). It is there made clear that the decision below has far reaching implications. For more than ten years all of the administrative and enforcement machinery set up by the Labor Department, and all of the regulations and interpretations applicable to both basic statutes, which have been issued by the Administrator or the Secretary of Labor, together with the recommendations made to Congress and the appropriations made by Congress, have all been on the assumption that the Fair Labor Standards

Act and the Walsh-Healey Public Contracts Act were not mutually exclusive. The opinion of the Court below upsets all this, throws the administration of both Acts into confusion and will require large scale review and modification of all existing administrative regulations and interpretations (Administrator's brief, supra, R. 1024-1032). The Administrator further points out that this confusion will be aggravated by the curtailment of remedies under the opinion of the Court below. In the past the availability of the employees suit, and the criminal sanctions of the Fair Labor Standards Act, have been most effective in the enforcement of both Acts (Administrator's brief, supra, R. 1032-1035). We submit that the views of the Labor Department, as set out in their brief in support of the petition for rehearing in the Court below (R. 1023 et seq.), but emphasize the public importance of the questions presented, and make it clear that this case presents important questions of Federal law that have not been, but should be settled by this Court.

3.

The opinion below is in conflict with the decision of the Court of Appeals for the Sixth Circuit in Walling etc. v. Patton-Tulley Transportation Company, 134 F. (2d) 945 (6th Cir., decided 1943). That was an enforcement proceeding by the administrator to compel compliance with the wage and hour provisions of the Fair Labor Standards Act. It involved a public project being done on the Mississippi and Missouri Rivers by Patton-Tulley Transportation Company, under contract with the United States. The workers in question were "engaged in constructing and repairing dikes and revetments" in the channels of the Missouri and Mississippi Rivers (l. c. 946). It was urged in defense that the wage and hour provisions of the Fair Labor Standards Act with respect to the employees in

question had been "superseded" (l. c. 948, top 2nd column) by an amendment to the Eight Hour Law enacted September 9, 1940 (40 U. S. C. A. 325a). The Eight Hour Law enacted June 19, 1912 (40 U. S. C. A. 324, 325) applied to public contracts, to-wit, every contract to which the United States was a party which required the employment of laborers and mechanics. The amendment of September 9, 1940, provided that "notwithstanding any other provision of law" work in excess of eight hours per day should be computed on the basic day rate of eight hours per day, and should be compensated for "at not less than one and one-half times the basic rate of pay." Section 7 of the Fair Labor Standards Act prohibits work in excess of forty hours per week unless compensated for at not less than one and one-half times the "regular rate;" and prescribes no method of computing the regular rate. The District Court had ruled that these differences made the two enactments repugnant and inconsistent, and therefore concluded that the Eight Hour Law amendment superseded the Fair Labor Standards Act in respect to wages and maximum hours of the employees in question. The Court of Appeals for the Sixth Circuit, however, disagreed. It found nothing repugnant in the two statutes, nor any difficulty in requiring compliance with both. We quote (l. c. 948) paragraph 6, to-wit:

> "We perceive no difficulty in the reconcilement of the Eight-Hour Law amendment with the Fair Labor Standards Act. The one limits employment at basic pay to 40 hours a week, the other deals solely with daily employment of men in certain classifications, and limits such employment at basic pay to 8 hours a day. No difficulty will be perceived in complying with both statutes,—giving overtime pay for work in excess of the weekly maximum in the one case, and overtime pay for work in excess of the daily maximum in the other."

The Sixth Circuit then proceeded to rule that the Fair Labor Standards Act applied to work under Government contracts, remarking that this was particularly true in war time when most major industries were operating on Government contracts (l. c. 949):

> "Like the Fair Labor Standards Act, the Eight-Hour Law is one whose purpose it is to eliminate sub-standard working conditions. As such it should be given construction to effect such purpose. Overstreet v. North Shore Corp., supra. The argument that it was the Congressional intention to make the Fair Labor Standards Act inapplicable to work under government contract, must be rejected. No reason appears why contractors for the government are to be permitted to maintain substandard labor conditions while private contractors are prohibited from so doing, and such view would thwart the clearly defined purpose of the Congress, particularly if applied at a time when all, or nearly all, major industries are operating upon government contract."

We submit that the differences between the Fair Labor Standards Act applying to employees engaged in the production of goods for commerce, and the Walsh-Healy Public Contracts Act applying to employees engaged in the manufacture of materials, supplies, articles and equipment under public contract, are no greater than the differences between the Fair Labor Standards Act and the Eight Hour Law as amended September 9, 1940, applying to public contracts requiring employment of laborers and mechanics. Yet in the latter case the United States Court of Appeals for the Sixth Circuit in Walling v. Patton-Tulley Transportation Co. had no difficulty in reconciling the two, and in giving effect to both at the same time, and on the same project. The opinion below is in direct conflict with the decision and rationale of the Sixth Circuit

in the Walling case. It has been the custom of this Court to take jurisdiction on certiorari to resolve such conflicts.

This precise question seems to have been raised in only one other case—Lasater v. Hercules Powder Company, decided by the District Court for the Eastern District of Tennessee July 25, 1947, 73 Fed. Supp. 264. In the Lasater case the plaintiffs were employees of Hercules Powder Company that operated the Government-owned ordnance plant near Chattanooga, Tennessee, under a cost-plus-a-fixed-fee contract with the War Department for the manufacture of munitions. The action was brought under the Fair Labor Standards Act to recover overtime compensation, liquidated damages and an attorney's fee. The defendant disclaimed liability, among other reasons, because "the rate of pay and working conditions of the plaintiff were regulated by the Walsh-Healey Act, the Eight Hour Law, and the Davis-Bacon Act, and not by the Fair Labor Standards Act of 1938" (l. c. 267). The Court held, however, that the Fair Labor Standards Act was not restricted because of either of these previous enactments. In so holding the Court said (l. c. 268):

> "From an examination of the Eight-Hour Law, the Davis-Bacon Act and the Walsh-Healey Act, together with the Congressional history of labor laws raising standards of pay and working conditions, the conclusion is quite evident that the intended coverage of the Fair Labor Standards Act is not restricted because of these previous enactments. I deem it unnecessary to undertake to analyze the premises resulting in this conclusion.
>
> "The Fair Labor Standards Act is applicable to work under government contracts. Walling v. Patton-Tulley Transp. Co., 6 Cir., 134 F. 2d 945."

As the Lasater case, supra, is directly in point on the facts, and rules squarely that the intended coverage of the Fair

Labor Standards Act is not restricted because of the previous enactment of the Walsh-Healey Act, it is apparent that the ruling below is not only in conflict with the Sixth Circuit, but with the weight of authority as well.

We urge further that there is also involved in this case the issues in respect to interstate commerce presented to this Court, but not decided in Kennedy v. Silas Mason Co., 334 U. S. 249. Assuming that this Court in this proceeding will reject the ruling below to the effect that the Fair Labor Standards Act and the Walsh-Healey Act are mutually exclusive and cannot apply at the same time, it still must be determined in this proceeding whether or not the products produced at the St. Louis Ordnance Plant were produced for commerce, and were goods, under the language of the Fair Labor Standards Act. These have been the principal defenses of the respondent heretofore in this case, and it would seem to us that the issue will have to be resolved in order to finally determine the question of coverage. On these points the Seventh and Fifth Circuits are in direct conflict. The Seventh Circuit in Bell v. Porter, 159 F. (2d) 117, has squarely ruled that the cost-plus-a-fixed-fee contractors with the Government engaged in war production were not agents of the Government, that they did not share in the Government's sovereign immunities, and that their employees were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act, and that commerce included all transportation across state lines irrespective of the ownership of the plant or the munitions, or the fact that they were shipped for war purposes. (See also Umthun v. Day & Zimmermann, 235 Ia. 293, 16 N. W. [2d] 258; Clyde v. Broderick, 144 F. [2d] 348 [10th Cir.]; Jackson v. Northwest Airlines, 75 Fed. Supp. 32; Timberlake v. Day & Zimmermann, 49 Fed. Supp. 28, and numerous other decisions taking this view.) On the contrary, the Fifth Circuit in Ken-

nedy v. Silas Mason Company, 164 F. (2d) 1016, has taken a directly opposite view, holding that the transportation of such munitions is not commerce, and that the munitions produced were not goods within the meaning of the Fair Labor Standards Act, and this view has been followed in other decisions, notably in the Fifth Circuit. It was to resolve these conflicts that this Court granted certiorari in the Silas Mason case. These conflicts still exist.

We here present a record that contains all the facts necessary to afford a basis for the determination of these conflicts, and there is thus additional reason why this Court should grant certiorari in this case.

CONCLUSION.

Summarizing, we submit that we have here a classical example of the type of case in which this Court has been accustomed to grant certiorari. The questions presented are of great public importance; the decision thereof will not only decide the instant case, but will control much other litigation, and the administration by a Government department of the two most important federal statutes in the field of labor relations, and will also determine the proper construction of the National Defense Act of June 2, 1940 in an important respect. The construction placed on these statutes by the Court below is unprecedented, and we respectfully submit is supported by neither reason nor authority. It conflicts with a decision in the Sixth Circuit and is opposed to the weight of authority, and the final determination of this case will also involve a resolving of the conflict between the Seventh and Fifth Circuits in respect to commerce. The public interest would seem to require that all these conflicts be resolved, and we submit that the proper construction of the above mentioned federal statutes in the important respects here involved are matters which should be definitely settled by this Court.

PRAYER FOR WRIT.

Wherefore, petitioners pray that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Eighth Circuit, commanding that Court to certify and send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of all the record and all proceedings in the cause numbered and entitled on its docket as No. 13663, The United States Cartridge Company, a corporation, Appellant, v. R. M. Powell et al., Appellees, and that said judgment of the United States Court of Appeals for the Eighth Circuit may be reversed by this Court; and that your petitioners may have such other and further relief in the premises as to this Court may seem meet and just.

THOMAS BOND,
Attorney for Petitioners.

BRIEF.

In Support of Petition for Certiorari.

The statement of the **grounds of jurisdiction**, reference to the **opinion below**, and the **statement of the case** required by Rule 27 are all set out in the foregoing petition for certiorari.

Specification of Assigned Errors to be Urged.

The Court of Appeals for the Eighth Circuit erred:

1. In holding that the Fair Labor Standards Act and the Walsh-Healey Act are so divergent that both may not apply at one and the same time (R. p. 995).

2. In holding that the petitioners and all other employees of respondent were at all times exclusively engaged in the production activities to which the Walsh-Healey Act applies (R. pp. 992, 995).

3. In holding that petitioners were within the coverage of the Walsh-Healey Act.

4. In holding that petitioners were not within the coverage of the Fair Labor Standards Act.

5. In holding that the provisions of the prime contract (Defendant's Exhibit 20, R. p. 783) made the Walsh-Healey Act applicable to the exclusion of the Fair Labor Standards Act.

6. In holding that the provisions of the Act of July 2, 1940, or any action of the Secretary of War thereunder, excluded petitioners from the benefits of the Fair Labor Standards Act.

7. In holding that employees of the St. Louis Ordnance Plant engaged in the production of goods for interstate commerce were not within the coverage of the Fair Labor Standards Act.

8. In holding that the United States District Court was without jurisdiction to grant relief under the Fair Labor Standards Act.

ARGUMENT.

I.

The Fair Labor Standards Act and the Walsh-Healey Act Are Not Mutually Exclusive.

The basic error in both opinions below rests in the assumption that the Walsh-Healey Act excludes coverage under the Fair Labor Standards Act, and that both Acts cannot apply at the same time. This assumption is contrary to the language of both enactments, their legislative history, long standing departmental interpretation and Court decisions. The Walsh-Healey Act was enacted June 30, 1936 (41 USCA 35-45). The Fair Labor Standards Act was enacted June 25, 1938 (29 USCA 201-209). Congress was thus aware of the existence of the Walsh-Healey Act and numerous other enactments in the field of public contracts and labor relations. Congress made express provision against any possible limitation of the Fair Labor Standards Act by reason of these enactments, to-wit: Section 18 provides that no provision of the Act shall excuse noncompliance "with any federal or state law or municipal ordinance" establishing a higher minimum wage or a lower maximum workweek (29 USCA 218). Further, by Section 13 Congress expressly excluded from the scope of the Fair Labor Standards Act employees covered by certain other acts, to-wit: employees subject to regulation under the Railway Labor Act (Sec. 13 [a] [4]), or any employee with respect to whom the Interstate Commerce Commission has power to regulate maximum hours, under the Motor Carriers Act or the Interstate Commerce Act (Sec. 13 [b] [1] [2]). The failure of Congress to make similar provision for the exclusion of employees covered by the Walsh-Healey Act is a clear indication that Congress did not intend that they be excluded if otherwise within the coverage of the Fair Labor Standards Act.

Further, on May 13, 1942 Congress amended the Walsh-Healey Act providing for the exemption of employers who had entered into agreements with their employees "pursuant to the provisions of Pars. 1 or 2 of subsection (b) of Section 7 of an Act entitled 'Fair Labor Standards Act of 1938' " (56 Stat. 277; 41 USCA 35 [c]). It is apparent that Congress thus recognized that the two statutes could overlap, and that certain employees came under both Acts, because if the two Acts could not apply at the same time, as the Court below ruled, there would have been no reason whatever for this amendment. Further, the application of the Fair Labor Standards Act to employees of cost-plus-a-fixed-fee contractors in the war plants was definitely recognized by Congress in the amendment to the Fair Labor Standards Act enacted May 14, 1947, known as the Portal-to-Portal Act of 1947. One of the stated purposes of that Act was to invalidate portal-to-portal claims by employees under the Fair Labor Standards Act because of the "increased cost of war contracts." (Public Law 49, 80th Congress, Chap. 52, 1st Sess., 29 USCA Pocket Part 251 [a] [9]).

In addition to all this, it appears that for more than ten years the Department of Labor has consistently interpreted the two Acts on the theory that they were not repugnant and that application of both Acts to employees of government contractors who were engaged in commerce or the production of goods for commerce was in harmony with the common objectives pursued by Congress in enacting both types of labor regulation. As pointed out in the brief for the Administrator of the Wage and Hour and Public Contracts Division of the Department of Labor filed below in support of the petition for a rehearing (R. 1028-1031) Congress was repeatedly made aware of the Department's interpretation, and with that knowledge made appropriations for enforcement. This has been held to be

a confirmation and ratification of the administrative interpretation. Brooks v. DeWar, 313 U. S. 354, 361; Flemming v. Mohawk Co., 331 U. S. 111, 116.

Further, the uncontradicted evidence in this case discloses that the parties themselves interpreted the two Acts as having concurrent application. All employees of the respondent on their employment were given a booklet in which the Company's labor policies were set out, and in that booklet it was expressly stated, to-wit, (Plffs' Exhibit 3-C, R. 188, 189, 206):

> "There will be eight hours in any working day, and forty hours will constitute a working week. To meet the schedule required of us by the National Defense Program, it will be necessary to employ three shifts on production operations. When production demands require a longer work day, or longer work week, the Company will pay the legal overtime rate as provided under the Walsh-Healey Act, and the Fair Labor Standards Act. When three shifts are operating there will be rotation of the first, second and third shifts every two weeks. A lunch period will be allowed on each shift and will be paid for by the Company, that is, no deduction will be made for this lunch period."

Decisions holding that the two enactments are not repugnant and that coverage under the Walsh-Healey Act does not exclude coverage under the Fair Labor Standards Act have been cited, supra, under Reasons for Granting Writ. We know of no cases to the contrary.

As additional authority, we cite the decision of this Court rendered May 16, 1949, in Brooks v. The United States (Nos. 388 and 389, October Term, 1948) holding that the Tort Claims Act and the Veterans' Laws are not mutually exclusive. In reaching this conclusion this Court said:

> "Unlike the usual workmen's compensation statute, e. g., 33 U. S. C., §905, there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. * * * Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act, 5 U. S. C., §757. Thus **Dahn v. Davis**, 258 U. S. 421, and cases following that decision, are not in point. Compare **Parr v. United States**, 172 F. 2d 462. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so." * * *

We submit that the decision below to the effect that these Acts cannot both apply at the same time is untenable.

II.

The Walsh-Healey Act Had No Application to Petitioners.

We have pointed out above that if there was an overlapping of the Fair Labor Standards Act and the Walsh-Healey Act with respect to petitioners, that such fact would not exclude relief. We submit further, however, that petitioners were not shown to be within the purview of the Walsh-Healey Act and that the holding below that they were is not supported by any evidence.

The Fair Labor Standards Act not only covers workers actually engaged in production but also includes workers engaged "in any process or occupation necessary to the production thereof" [Section 3 (j)].

The Walsh-Healey Act, on the contrary, does not contain such a clause and its scope is limited to workers employed "in the manufacture or furnishing of the materials," etc. [Section 1 (b)]. Petitioners were inspectors or

engineers (these terms being interchangeable) in the Safety Department. They were required to patrol the units, inspect safety conditions, and report on violations of safety rules or unsafe conditions. (See description of the duties of the safety engineers in the manual of instructions given by respondent to all petitioners, marked Plaintiffs' Exhibit F, Record pp. 68, 69 to 71.) These duties were, of course, an occupation necessary to the production of the munitions within the meaning of Section 3 (j) of the Fair Labor Standards Act and the complaint so charges (R. p. 6). This work, however, was not employment "in the manufacture or furnishing of materials," etc., within the limited language of the Walsh-Healey Act. Coverage under the Walsh-Healey Act is a question of fact which this Court has held must, in the first instance, be determined by the Secretary of Labor (Endicott Johnson Corp. v. Perkins, 317 U. S. 501, l. c. 508, 509).

The respondent, United States Cartridge Company, interpreted the Labor Department's rulings and regulations promulgated under the Walsh-Healey Act as exempting petitioners from the Act. Defendant's Exhibit 14, R. p. 611, offered in evidence by respondent (R. 613), is in part as follows:

> "(b) He is also exempt from the overtime provisions of the Walsh-Healey Act because the provisions of that Act are not 'deemed applicable to office or custodial employees'; Regulations, Article 102, A. J. McMahon, Occupational Analyst."

Petitioners' duties were largely office and clerical, particularly in making out their reports, and their activities in patroling the units and checking on safety violations were of a custodial nature. They did not question the fact that they were exempt from the provisions of the Walsh-Healey Act. Thus it appears that the Court below has

reversed this case on an issue of fact not pleaded in the answer as a defense, not tried in the District Court, and has drawn a conclusion of fact contrary to the position taken by both parties, both throughout the employment and during the trial in the District Court. We submit that the ruling was error.

See also discussion of this point in the Petition for Rehearing below [R. 1007, l. c. 1013 (b)-1015].

III.

The Act of July 2, 1940.

The concurring opinion approved by a majority of the Court below suggests that there is in the Act of July 2, 1940 [54 Stat. 712, Ch. 508, 50 U. S. C. A., App. Sec. 1171 et seq., 5 U. S. C. A., Sec. 189 (a)] "a reservoir of power in the Secretary of War so to act, independent of the Wage and Hour provisions of any other statute" (R. 1000). This resembles the defense urged by the contractor in the Silas Mason case, supra, to the effect that the 1940 Act set up a wholly new system of war production which prescribed a complete system of labor relation by statute, superseding and precluding the operation of the Fair Labor Standards Act (Kennedy v. Silas Mason Co., 334 U. S. 249, l. c. 256). We submit that these contentions are refuted:

(a) By the language of the Act itself, in that the 1940 Act did not specifically provide for the suspension of the Fair Labor Standards Act, and contains no provision which conflicts with the operation of that Act, and that these facts together with the specific suspension by Congress of a number of other statutes, clearly indicates that suspension of the Fair Labor Standards Act was not intended. [See July 2, 1940 Act, Secs. 1 (a), 1 (b), 2 (a), 2 (b), 3 and 4 (a).]

(b) By the legislative history of the 1940 Act, to-wit, the House Committee on Military Affairs, listed and explained the statutes which would be suspended by the 1940 Act (H. Rept. 2261, 76th Congress, 3rd Sess. 1940) and a member of that Committee enumerated on the floor of the House the statutes which would be suspended (86 Cong. Record 6826). In neither case was the Fair Labor Standards Act mentioned.

Further, the amendment to the July 2, 1940 Act, making reference to the Walsh-Healey Act, was proposed by Senator Wagner, who pointed out that the Walsh-Healey Act only applied to contracts let after advertisement and public bidding, whereas this National Defense Act provided for negotiated contracts. The only purpose of this amendment was to make it clear that contracts negotiated under this legislation would be subject to the provisions of the Walsh-Healey Act. He explained this fully on the floor of the Senate, and in the course of his explanation said (Cong. R., Vol. 86, pt. 7, p. 7924, June 11, 1940):

> "Unless this amendment is adopted, we should have this anomalous situation: under a contract entered into with the Government as the result of public bidding one set of minimum wages, that is, the prevailing wages, would be applied, whereas under another contract entered into as a result of negotiations, a much lower minimum wage would be paid, that is, the flat minimum **under the Wage and Hour Act.**" (Emphasis ours.)

We submit that the language just quoted makes it clear that the Senate acted on the Wagner amendment on the assumption that without it employees producing goods under contracts such as the one involved in this case would be subject **only** to the "Wage and Hour Act" meaning, of course, the Fair Labor Standards Act.

(c) The War Department in September, 1940, expressed the opinion that employees working at ordnance plants, such as the one operated by respondent in this case, were covered by the Fair Labor Standards Act. (See letter of Secretary of War to the Comptroller General, dated August 25, 1942. Full text of this letter appears in the brief for the United States filed by the Solicitor General in the Silas Mason case, pp. 13 and 14 footnotes.)

(d) We submit further that even if the Secretary of War had the powers suggested in the concurring opinion, which we deny, nevertheless he never exercised any such power in respect to wages and hours of the workers in the St. Louis Ordnance Plant. The reference in the Prime Contract [R. p. 783, Art. 3 (d)] to the Walsh-Healey Act, and the inclusion of certain representations and stipulations pursuant to that Act was not an attempt by the Secretary of War to regulate wages and hours in this Plant, but was merely a compliance with the express language of Section 1 of the Walsh-Healey Act, which required that in all public contracts involving an amount in excess of $10,000 such representations and stipulations be included. It was apparent, of course, that in the performance of this contract some employees would be employed who were within the coverage of the Walsh-Healey Act, and the representations and stipulations referred to in Section 1 of the Act were included in the contract for their benefit, as the law required they should be.

We respectfully submit that the reference in the contract to the Walsh-Healey Act, and the inclusion of this matter in the Prime Contract had no other significance.

We submit further that our contention that the Act of July 2, 1940 was not intended to suspend operation of the Fair Labor Standards Act in the war plants is supported by Executive Order No. 9301 signed by the President Feb-

ruary 9, 1940 (8 Fed. Reg. 1825), quoted in full Rec. pp. 1021-1022. This is the Executive Order that prescribed the forty-eight hour minimum wartime work week. It is the order under which petitioners herein were required to work a six day week, and it expressly provides in Paragraph 5 thereof, as follows:

> "Nothing in this Order shall be construed as superseding or in conflict with any Federal, State or local law limiting hours of work or with the provisions of any individual or collective bargaining agreement with respect to rates of pay for hours worked in excess of the agreed or customary work week, nor shall this Order be construed as suspending or modifying any provisions of the Fair Labor Standards Act (Act of June 25, 1938; 52 Stat. 1060; 29 U. S. C. 201 et seq.) or any other Federal, State or local law relating to the payment of wages or overtime."

This Executive Order remained in force throughout the entire period of the war, and we respectfully submit makes it clear that the Fair Labor Standards Act should apply for the benefit and protection of the workers in the war plants.

We submit that there is nothing in the Act of July 2, 1940, or any executive action taken by the President under his war powers that is suspensive of the Fair Labor Standards Act. The Act itself was never urged by the respondent in defense of this case, and was never even cited or mentioned in the Trial Court, where the case was tried on the theory that this enactment had no bearing on the issues involved.

IV.

The Munitions Manufactured at the St. Louis Ordnance Plant Were "Goods" and They Were "Produced for Commerce" Within the Meaning of the Fair Labor Standards Act.

Mindful of this Court's admonition, Rule 38, Parg. 2, that supporting briefs must be "direct and concise" we leave the full development of these points to a later stage of the case. Summarizing the argument, we contend that the language in Section 3 (d) of the Fair Labor Standards Act, to-wit, that it shall not include the United States, does not exempt employees of a private contractor operating a munitions plant under a cost-plus-a-fixed-fee contract with the United States. The adjudicated cases establish that employees who work for those who contract with the Government are not the Government's employees, even though the economic burden falls on the Government through a cost-plus-a-fixed-fee arrangement; and even though the Government may exercise a supervisory control over the performance of the contract. The contract here in evidence provides that the employees shall be subject to the control and constitute employees of the contractor. It subjected the contractor to many statutes inapplicable to Government employees [R. 773 (i), 790 (111-j), 786-7 (b)], and to accept the argument of the respondent herein would be to hold in effect that the employees of such contractors are Government employees for purposes of the Fair Labor Standards Act, but not with reference to anything else. We contend further that munitions produced at a Government owned plant under a cost-plus-a-fixed-fee contract and intended to be transported across state lines for war purposes are produced for commerce within the meaning of the Fair Labor Standards Act even though the title to the goods is in the Government and the shipments are at Government direction. We also contend that

a private contractor operating a plant under a cost-plus-a-fixed-fee arrangement is not an agency of the United States and does not share any of the Government's sovereign immunities, and that the goods here produced are produced for commerce within the meaning of the Fair Labor Standards Act.

We contend further that Section 3 (i) of the Act exempting goods after their delivery into the actual physical possession of the ultimate consumer does not apply to manufacturing operations which occurred before the goods came into the actual physical possession of the United States, and that the goods produced at the St. Louis Ordnance Plant were goods within the meaning of the Fair Labor Standards Act.

Amplifying somewhat on this summary and making reference to the pertinent authorities, we submit:

(a) **Petitioners not employees of the United States.** It has been decided that the employees of a private contractor operating under a cost-plus-a-fixed-fee contract are not employees of the Government, and that Government is not here present as the employer. U. S. v. Driscoll, 96 U. S. 421; Jackson v. Northwest Air Lines, 75 F. Supp. 32; Rumrich v. United States, 68 F. Supp. 792. In the Driscoll case the Supreme Court held that an employee of a cost-plus a percentage of cost contractor could not sue the United States for wages.

The contract in this case, Art. 1-E, provided that all persons engaged in the work "shall be subject to the control and constitute employees of the contractor" (R. 771).

(b) **Contractor not an agency of the United States.** It has also been authoritatively ruled that these Government Contractors are not agents, agencies or instrumentalities of the United States and are not entitled to enjoy any

of its sovereign immunities. Alabama v. King & Boozer, 314 U. S. 1; Curry v. U. S., 314 U. S. 14; Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 84 L. Ed. 322; Bell v. Porter, 159 F. (2d) 117. The Supreme Court has ruled that service performed by a private corporation under a contract with the United States does not make it an instrumentality of the latter even though the service is performed on Government owned property and under supervisory control by the Government. See Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 84 L. Ed. 322. There it was held that the exemption in the Social Security Act for services performed "in the employ of the United States Government or of an instrumentality of the United States" was inapplicable to employees of an Arkansas corporation organized for profit whose only business was the operation of a bath house on the United States Government reservation known as Hot Springs National Park, and the Court said (84 L. Ed. 325):

> "That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into its instrumentality."

We submit that the foregoing ruling applies with particular force here, where the Government expressly stipulated in the contract that the contractor was "in no wise an agent of the Government" (R. 780). These stipulations as to the "status of contractor" (R. 780), characterizing it is an independent contractor and not an agent of the Government, were **not included** in the contract before the Fifth Circuit in the Silas Mason Co. case.

(c) **Commerce.** The best considered cases sustain the view of the trial court, and of the Labor Administrator, and of the Solicitor General of the United States (see his

brief in Silas Mason case), that the goods produced at these war plants under the contract and evidence in this case are commerce within the meaning of the Fair Labor Standards Act. Notably, Bell v. Porter, 159 F. (2d) 117; Umthun v. Day & Zimmermann, Inc., 235 Iowa 293, 16 N. W. (2d) 258; Jackson v. Northwest Air Lines (D. C. Minn., Oct. 9, 1947), 75 F. Supp. 32; Timberlake v. Day & Zimmermann, Inc., 49 F. Supp. 28. We earnestly ask the Court's consideration of the reasoning in these four cases.

We particularly stress the decision in the Jackson case, where it answers the argument that war is the negation of commerce (75 F. Supp., l. c. 39), pointing out that war is no more the antithesis of commerce outside the battle areas when the Government ships the goods, than it is when they are shipped by private producers or manufacturers. It is obvious that in the prosecution of a global war the Government must of necessity utilize the facilities of commerce, and this commerce does not lose its character as such merely because the Government directs the shipments.

Even the Fifth Circuit Court of Appeals in the Silas Mason case concedes that if this were a contract of a manufacturer to make and deliver munitions of war to the United States its employees would have been subject to the Fair Labor Standards Act. We quote (164 F. [2d], l. c. 1017):

> "Had the defendant been engaged under its contract in the business of manufacturing **munitions of war**, either as a general proposition, or under contract by which it agreed to produce and sell to the Government, either at fixed prices, or at prices to be fixed from time to time, then we are of opinion that it would come within the Fair Labor Standards Act." (Emphasis ours.)

Such a distinction between workers for ordinary war contractors and cost-plus-a-fixed-fee contractors is wholly illogical. It would mean that workers for these two types of contractors, working for the same end, and under the same conditions, and making the same thing for the same purposes, would by reason of a difference in the type of contract be subject to different requirements as to minimum and maximum wages and overtime payments. There is no valid reason for such a distinction, and Judge Hutcheson aptly pointed it out in his dissent (l. c. 1020):

> "I ask upon what permissible theory can it be claimed that appellants are not covered here, when it is conceded that had they been working for a private plant which made munitions for sale and delivery to the United States for war, they would have been. The munitions in both cases would be for purposes of war and not of ordinary trade, but in both cases they would have been produced for transportation from a state to a place outside thereof."

In this connection it is interesting to note that the War Labor Disputes Act (50 U. S. C. A., Appendix, Secs. 1501-1511), after authorizing the War Labor Board to decide labor disputes in plants producing articles or materials necessary or useful to the war effort, expressly provided in Sec. 1507, subparagraph (2) that:

> "In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938 as amended."

Thus clearly indicating that Congress intended the Act to apply to workers on goods produced for the war effort.

Commerce need not be commercial. Bell v. Porter, 159 F. (2d) 117, Syl. 3, l. c. 119, par. (3). Mere interstate transportation suffices.

The narrow concept of commerce as being merely trade or traffic has never obtained in this country. "Commerce," in the Constitution, is without a definition, but the United States Supreme Court has, from earliest times, construed it to include more than trade or traffic, beginning with Gibbons v. Ogden, 9 Wheat. 1, to and including United States v. Southeastern Underwriters' Ass'n, 322 U. S. 533, 88 L. Ed. 1440. In the latter case the Court observed (at p. 549): "* * * not only then may transactions be commerce, * * * though non-commercial * * *."

Recently the United States Supreme Court held, in National Labor Relations Board v. Fainblatt, 306 U. S. 600, 83 L. Ed. 1014, Syl. 3, l. c. 1018:

> "Transportation alone across state lines is commerce within the constitutional control of the national government and subject to the regulatory power of Congress."

There are many other decisions of the United States Supreme Court expressing the view that commerce need not be commercial, e. g., Gooch v. U. S., 297 U. S. 124, 56 S. Ct. 395, 80 L. Ed. 522 (kidnapped persons); Brooke v. U. S., 267 U. S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A. L. R. 1407 (stolen automobiles); Weber v. Freed, 239 U. S. 324, 36 S. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317 (prize fight films); Hoke v. U. S., 227 U. S. 308, 33 S. Ct. 281, 57 L. Ed. 523, 43 L. R. A., N. S., 906 Ann. Cas. 1913E, 905, and Caminetti v. U. S., 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 443, L. R. A. 1917E, 502, Ann. Cas. 1917B, 1168 (women for immoral purposes); Champion v. Ames (lottery case), 188 U. S. 321, 23 S. Ct. 321, 47 L. Ed. 492 (lottery tickets); Reid v. Colorado, 187 U. S. 137, 23 S. Ct. 92, 47 L. Ed. 108 (diseased stock); United States v. Simpson, 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665, 10 A. L. R. 510, and United States v. Hill, 248 U. S. 420, 39 S. Ct. 143, 63 L. Ed. 337, (intoxicating liquors for personal use).

The respondent's argument that these shipments were administrative acts of the Government stems from a dictum in National Labor Relations Board v. Idaho Maryland Mines Corporation, 98 Fed. (2d) 129, l. c. 131. It involves the false conception that commerce must involve "commercial transactions," and the Court making it had some doubts as to its correctness (l. c. 131). Timberlake v. Day & Zimmermann, 49 Fed. Supp. 28, l. c. 32 and 33.

The argument is answered and the authorities on which it is based are distinguished in Timberlake v. Day & Zimmermann, supra, l. c. 32, 33, and in Umthun v. Day & Zimmermann, 16 N. W. (2d) 258, l. c. 260-262. It was also answered by Judge Nordbye in Jackson v. Northwest Air Lines, 75 Fed. (2d) 32, l. c. 38, 39, as follows:

> "* * * But those cases approach the problem on the theory that the transportation activity is a governmental administrative act, and therefore is not commerce, or else on the theory that the goods are war goods and therefore not in commerce. It seems more sound, however, to conclude that the rules of statutory construction and the broad intent and purpose with which Congress enacted the Fair Labor Standards Act require the view that Congress did not intend to exempt by indirection and silence the employees of private employers who perform services or furnish goods to the Government for use by it even if the Government transported the goods across state lines with its own personnel or under its own name, or even if it intended to use the goods for war purposes. The administrative capacity in which the goods were transported herein may be assumed. But is not such transportation 'commerce' as between plaintiffs and the defendant (employees and employer) in the instant situation within the meaning of the Fair Labor Standards Act? The one who transports the goods

and its status in doing so has no necessary relation to the interstate activities of private employers and employees in view of the purposes of the Fair Labor Standards Act. Moreover, it is generally recognized that, as far as commerce is concerned, the one who owns the goods when transportation is effected is immaterial."

Also in the case of Clyde v. Broderick et al., 144 F. (2d) 348, the Tenth Circuit ruled, l. c. 351, paragraph 6, that shipments across state lines "for the convenience of the United States Government" were commerce.

Respondent's contention that under the rule in United States v. Hoar, 2 Mason 311, shipments by the Government are not commerce, because the Government is not included within the general terms of the Act, was answered and rejected by the Supreme Court of Iowa in Umthun v. Day & Zimmermann, 235 Ia. 293, 16 N. W. (2d) 258, l. c. 260, as follows:

"The statement of Justice Story in the Hoar case is by no means a hard and fast rule by which the sovereign is excluded from general terms of a statute; the purpose, subject matter, context, legislative history and executive interpretation are aids to construction which may indicate an intent to bring the sovereign within the scope of the law. United States v. Cooper Corp., 312 U. S. 600, 61 S. Ct. 742, 85 L. Ed. 1071, 1074, 1075, Roberts, J.

"Cases in which the doctrine of the Hoar case have been applied are of two classes: (1) Those where the act, if the sovereign were not excluded, would deprive it of a recognized or established prerogative title or interest. A classic example of these cases is United States v. Hoar itself, holding the sovereign is exempt from general statutes of limitations. (2) Those

where the act would work obvious absurdity if the public or its officers were not held to be impliedly excluded, as, for example, the application of a speed statute to a policeman pursuing a criminal or to a fire department responding to a fire alarm. Nardone v. United States, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314, 317, Roberts, J. Plainly, this case does not fall within either of these classes. The government is not a party to the case. It is not resisting plaintiff's action, but, on the contrary, the Department of Labor has filed an amicus curiae brief urging a reversal. Plaintiff was not an employee of the government but of a private corporation.

"There is another recognized exception to the rule, if it can be called such, of United States v. Hoar. Where a statute is for the public good or to prevent injury and wrong, the sovereign is bound by it, although not particularly named therein. Nardone v. United States, supra, 302 U. S. 379, 58 S. Ct. 275, 82 L. Ed. 314, 318; United States v. Herron, 20 Wall. 251, 22 L. Ed. 275, 276. It would seem that the Act involved here was intended for the public good and to prevent injury and wrong."

We submit further that if, as respondent contends, the Act could be deemed inapplicable because the procurement of these munitions was an administrative act, the same argument would exclude great segments of the working population, because all workers under Government contracts would be excluded. In other, but analogous situations, exclusion on this ground has been denied. Take the case of the United States mails as relating to the National Labor Relations Act. Employees of contract mail carriers have been held as in commerce. National Labor Relations Board v. Carroll, 120 F. (2d) 457. As relates to the Fair Labor Standards Act, employees of contract mail carriers

have been adjudged under the act. Thompson v. Daugherty, 40 F. Supp. 279; Fleming v. Gregory, 36 F. Supp. 776; Magann v. Transportation Co., 39 F. Supp. 742. And in the case of Walling v. Patton-Tulley Co., 134 F. (2d) 945, employees of an independent contractor on dike and revetment work on the Missouri and Mississippi Rivers were subject to the Fair Labor Standards Act.

Moreover, respondent's argument overlooks the fact that the existence of the Government of the United States was recognized and considered by the Congress in the enactment of the Fair Labor Standards Act, and provided for in Subsection (d) of Section 203. This is the sole provision to be found in the Act relating to governmental exemption and, as heretofore pointed out, it does not include employees of a private contractor.

The Act contains its own definition of "commerce" as "transportation * * * among the several states or from any state to any place outside thereof." The definition makes no exception in the cases of shipments at Government direction for military purposes [29 U. S. C. A. 203 (b)].

See also brief of the Solicitor General filed in this Court on behalf of the United States in the Silas Mason case, supra, pp. 23 to 37, particularly pp. 33, 34, where it is stated that all official statements of policy during the war, military as well as civil, including testimony of the officers of the War, Navy and Labor Departments, and of the War Production Board, were to the effect that war production would be harmed rather than helped by suspension of the overtime provisions of the Fair Labor Standards Act. Also that some eighteen bills were introduced in Congress proposing the suspending or restricting of the overtime provisions of the Fair Labor Standards Act, and that Congress rejected all of them, and, further, that in the enact-

ment of the Portal-to-Portal Act of 1942 [29 U. S. C. A., Pocket Part, Sec. 251 (a) (9)] Congress made it clear in its findings that it was aware of and recognized the applicability of the Fair Labor Standards Act to employees of cost-plus-a-fixed-fee contractors with the Government.

(d) **Goods.** The respondent's contention that the ammunition produced at this plant was not goods within the meaning of Section 3 (i) of the Fair Labor Standards Act was rejected in Bell v. Porter, Jackson v. Northwest Air Lines, Umthun v. Day & Zimmermann, Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, and other cases. In the first place, respondent's assumption that the Government was the ultimate consumer is not based on any evidence and entirely ignores Lend-Lease. Under this enactment great quantities of ammunition produced in the United States were consumed by our allies, particularly England, Russia and China, and there is no proof that the particular ammunition referred to in this record was consumed by the United States. Moreover, the exemption in Section 3 (i) was made for the benefit of the ultimate consumer. The respondent, United States Cartridge Company, was **not** the ultimate consumer; it was the producer, manufacturer or processor, and hence **it** is not entitled to invoke the benefit of the exception stated in Section 3 (i). Jackson v. Northwest Air Lines, 75 F. Supp. 32, l. c. 41 (9).

Aside from these considerations, however, the respondent's argument is fundamentally and basically unsound, as appears from the very language of the statute itself. The exception follows the definition of the word "goods" in Section 3 (i), as follows:

> "but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer or processor thereof."

It is the Wage and Hour Administrator's interpretation that the purpose of the above quoted exception was to protect ultimate consumers other than producers, etc., from the penalties attendant upon violation of Section 15 (a) (1) of the Fair Labor Standards Act, incident to transporting across a state line goods produced in violation of the Act. (Interpretative Bulletin No. 5, October, 1940, pages 3 and 4.) We quote in part, to-wit:

> "All that the term 'goods' quoted above is intended to accomplish is to protect ultimate consumers, other than producers, manufacturers, or processors of the goods in question from the 'hot goods' provision of Section 15 (a) (1)."

Thus, for example, if one buys a pair of shoes in a retail store, and wears them across the state line, he would, under the provisions of the above quoted exception, be protected from the penalties for a violation of Section 15 (a) (1), if the shoes were produced under substandard conditions.

But whatever the purpose of the exception, it is clear from its language that it only applies **after** delivery of the goods into the **actual physical possession** of the ultimate consumer. The uncontradicted evidence, including respondent's own exhibits, establishes that in this case the respondent, United States Cartridge Company, had physical possession, custody and care of the goods and materials in question for all manufacturing purposes, and for the performance of the contract. See Supplement 11 to the Contract, Art. III-Y (R. 833). This physical possession certainly continued until after manufacture was complete, and since the contractor was required by the contract to load the ammunition on to cars or carriers in accordance with the Government's shipping instructions (Contract, Art. I-E, R. 771), we contend that physical possession

could not have been obtained by the ultimate consumer until after arrival at destination. Therefore, since the work of producing the ammunition was done before actual physical possession was acquired by any ultimate consumer, obviously the exception stated in Section 3 (i) has no application. Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, l. c. 170, pars. 12-14; Jackson v. Northwest Air Lines, 75 F. Supp., l. c. 40, par. (B) et seq.

We excerpt from Hamlet Ice Co. v. Fleming, 127 F. (2d) 165, l. c. 170:

> "The contention is that the word 'goods' is subject to the exception wherever it occurs in the Act, and therefore the Ice Company produces nothing and sells nothing within the intendment of the Act. We do not think this argument is sound. It disregards the precise terms of the section that the goods excluded are not those in the possession of the maker but 'goods **after** their delivery into the actual physical possession of the ultimate consumer.' Goods in the course of production are therefore not expressly excluded and exclusion, we think, should not be implied."

See also the above brief of the Solicitor General in the Silas Mason case on this point (pp. 37 to 52).

The above interpretation of Section 3 (i) is the interpretation that the Administrator of the Wage and Hour Division has consistently placed upon that section of the Act. Interpretative Bulletin No. 5 (Oct. 1940), Parg. 6; readopted without change in the 1947 revision. See 29 Code Fed. Regs. Part 776.7 (h), 12 Fed. Reg. 4583, 4585. There the Administrator interprets Section 3 (i) as not exempting employees working on the goods during the course of manufacture, and says that this section "does

not affect the coverage of the act as far as the employees producing the products are concerned," and it concludes:

> "Congress clearly did not intend to permit an employer to avoid the minimum wage and maximum hours standards of the act by making delivery within the State into the actual physical possession of the ultimate consumer, who transports or ships the goods outside the State." (Emphasis ours.)

CONCLUSION.

In conclusion, we submit that certiorari should be granted, and the decision below should be reversed, and the judgment of the District Court affirmed.

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